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No. 84-1316

In the Supreme Court of the United States

OCTOBER TERM, 1984

TEXACO, INC., PETITIONER

v.

DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

THOMAS C. NEWKIRK
Chief Counsel

LARRY P. ELLSWORTH
Deputy Chief Counsel

DON W. CROCKETT
JOHN L. GURNEY
Attorneys
Economic Regulatory Administration
Department of Energy
Washington, D.C. 20545

18pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Department of Energy was not estopped from enforcing its price control regulations by an expressly non-binding letter written by a regional Federal Energy Administration (FEA) official and that the letter was entitled to little weight in construing the regulations.

2. Whether the court of appeals correctly held that the Administrator of the FEA had considered the relevant factors in promulgating new price control regulations in 1974 under the now-expired Emergency Petroleum Allocation Act of 1973.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 752 F.2d 650. The opinions of the district court on the cross-motions for summary judgment (Pet. App. 41a-67a, 68a-87a) are reported at 582 F. Supp. 911 and 582 F. Supp. 927.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1984. On January 8, 1985, the Chief Justice granted petitioner's request for an extension of time until February 15, 1985, to file a petition for a writ of certiorari, and the petition was filed on that date. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. (1976 ed.) 1904

note, as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 633.[1]

STATEMENT

1. The Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627 *et seq.*, authorized a program of mandatory allocation and price controls for petroleum products. Pursuant to that authority, the Federal Energy Administration (FEA) in 1973 promulgated the Mandatory Petroleum Allocation and Price Regulations,

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[1]The petition for a writ of certiorari appears to be jurisdictionally out of time. Section 211(g) of ESA, 12 U.S.C. (1976 ed.) 1904 note, provides in pertinent part:

> Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code * * * .

This judgment of the court of appeals was entered on December 17, 1984, and the petition was not filed until February 15, 1985. The time limits established by Congress for petitioning for certiorari are jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

Petitioner did obtain an extension of time for filing a petition in this case. However, neither Section 211(g) nor 28 U.S.C. 1254 explicitly authorizes such an extension of time. The general time provision for filing a certiorari petition in a civil case, 28 U.S.C. 2101(c), does permit extensions of up to 60 days, but that subsection also grants a litigant an initial 90-day period in which to file a petition. There is no evidence that Congress intended the 90-day initial period of Section 2101(c) to be inapplicable to Temporary Emergency Court of Appeals (TECA) cases, as it surely is in light of Section 211(g), yet to allow the 60-day extended period to be applied in such cases. Indeed, if the availability of a 60-day extension is implied, the purpose of substituting a 30-day time limit for the 90-day time limit of 28 U.S.C. 2101(c) — *i.e.*, to expedite review of TECA cases (see S. Rep. 92-507, 92d Cong., 1st Sess. 10 (1971))—would be substantially defeated. See *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 826 (1980).

10 C.F.R. Pt. 212 (1978). Subpart E of those regulations froze the prices of all refined petroleum products at their May 15, 1973 levels, but permitted refiners to pass through to customers any actual increases in the cost of the crude oil and natural gas used for refining.

While the increased cost of crude oil was relatively easy to determine, Subpart E provided no express method for determining the increased cost of the natural gas from which natural gas liquids (NGLs) had been extracted. See *National Helium Corp.* v. *FEA*, 569 F.2d 1137 (Temp. Emer. Ct. App. 1977). Accordingly, in September 1974, the FEA proposed to implement a method for calculating increased NGL cost, which it termed "natural gas shrinkage." [2] 39 Fed. Reg. 32718. The Notice of Proposed Rulemaking generally defined "natural gas shrinkage" as the average price the gas processor would have received for the NGLs had they been left in the natural gas stream and sold as natural gas. *Id.* at 32730.

After receiving both written and oral comments from the industry and other interested parties, the FEA adopted a new Subpart K, which incorporated the proposed "shrinkage" concept. 39 Fed. Reg. 44407 (1974). These new regulations required gas processors to determine their increased NGL cost by reference to the weighted average price at which the gas remaining after processing ("residue gas") was sold under the processor's existing residue gas sales contracts. 10 C.F.R. 212.162, 212.167 (1978).

2. During 1975 and 1976, petitioner Texaco, Inc. consistently calculated the increased shrinkage cost for each of its

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[2]The four basic natural gas liquids that are extracted from natural gas are propane, butane, natural gasoline, and ethane. Pet. App. 2a n.1. The term "shrinkage" refers to the fact that when a producer extracts natural gas liquids from a stream of natural gas, the volumetric and thermal values of the stream are reduced. *Id.* at 2a.

108 gas processing plants by determining the actual weighted average sales price received for the residue gas. Pet. App. 12a. However, in January 1977, during the course of an FEA audit, petitioner approached Larry White, the Director of Enforcement in the FEA's regional office in Dallas, Texas, and requested permission to change its method of calculating shrinkage at two of its gas plants, Floodway and Paradis. At these two plants, petitioner was obligated under its gas sales contracts to deliver only fixed quantities of gas. Since any additional volumes would be sold to other parties on the open market, petitioner contended that it should be allowed to use the theoretical intrastate gas market price rather than its actual weighted average sales price in calculating shrinkage. R. 718, 2646.

White agreed and directed his auditors to conduct a further review at Floodway and Paradis. After determining that most of the contracts were of the fixed-price variety, White sent petitioner a letter stating that the regional office would not take exception if petitioner began using such a method. R. 4011. However, this letter was conditioned as follows (Pet. App. 25a-26a n.17 (emphasis added)):

> Please be advised that our acceptance of the principles expounded in your second method is based on information provided by you and is subject to change based on additional facts or further clarification. *In order for you to have complete reliance on FEA's position, you must file a request for interpretation to the Office of General Counsel and we suggest that you immediately request such an interpretation. Therefore, this letter should not be construed to be an interpretation, ruling, or official position of FEA,* but rather should be viewed solely as a statement of the manner in which the provisions of 10 C.F.R. 212, Subpart K, are currently applied in our audits of natural gas processors.

Petitioner did not request an official interpretation from the General Counsel, but nonetheless began using its new method at its Floodway and Paradis plants. Subsequently, the Department of Energy's Office of Special Counsel completed the audit of petitioner's gas plants and rejected the informal interpretation contained in the White letter. Then, on January 5, 1979, the government filed an enforcement action against petitioner on behalf of DOE in the United States District Court for the District of Columbia, alleging inter alia that petitioner's shrinkage calculations at its Floodway and Paradis plants were improper and contrary to the plain meaning of the regulations. *United States* v. *Texaco, Inc.*, No. 79-0031. R. 698.

3. On June 21, 1979, petitioner intervened in the instant case, which had been initiated by other gas producers in the United States District Court for the Northern District of Texas. Petitioner sought a declaratory judgment that the White letter represented the correct interpretation of DOE's shrinkage regulations and, alternatively, that, as a result of the White letter, DOE was "estopped from denying the propriety of [petitioner's] method [for calculating shrinkage at Paradis and Floodway]." R. 725.

All plaintiffs subsequently filed a joint motion for summary judgment, and the Department responded with a cross-motion for summary judgment as to all plaintiffs and all issues.[3] R. 4292. The district court ruled in the Department's favor on all issues but one, which involved an unrelated ethane exclusion rule.[4] The district court found that

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[3]Petitioner asserts (Pet. 6) that it was not served with DOE's cross-motion (R. 1492) and that the Department's brief "did not mention the estoppel issues." However, the record reflects that petitioner was served (R. 4294) and that the estoppel issue was, in fact, argued as a matter of law in the government's brief. R. 4371-4375.

[4]The ethane exclusion rule is the subject of a separate petition for a writ of certiorari filed by Exxon Corp., No. 84-1142. No common issues are raised in the two petitions.

the Department's official interpretation of the shrinkage regulations was reasonable and that petitioner could not have reasonably relied upon the contrary White letter. Pet. App. 46a n.2. At the district court's direction, the Department prepared a form of judgment. Petitioner objected on the ground that its estoppel claim had been reserved for later trial. The district court then issued a supplemental memorandum expressly finding that the estoppel claim had been disposed of as a matter of law in the court's previous memorandum decision. Pet. App. 86a.

4. The court of appeals affirmed (Pet. App. 1a-40a). The court of appeals agreed with the district court that DOE was not estopped by the White letter from enforcing its price control regulations and that the letter was entitled to little or no weight as an agency interpretation of those regulations (*id.* at 25a-26a). The court of appeals also found that the agency had not acted arbitrarily or capriciously and had considered the relevant factors in promulgating the regulations (*id.* at 28a-29a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is accordingly not warranted.

1. a. Petitioner first contends (Pet. 9-12) that summary judgment was improper because there was a genuine issue of material fact regarding its reliance on the White letter. This argument is insubstantial.

As the court of appeals noted (Pet. App. 26a n.17), both the DOE regulations[5] and the White letter itself made clear

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[5]DOE regulations (10 C.F.R. 205.2) (see 10 C.F.R. 205.2 (1978) define an "interpretation" as

> a written statement issued by the General Counsel or his delegate or Regional Counsel, in response to a written request, that applies

that the letter was not "an interpretation, ruling, or official position of FEA" and that "[i]n order for [petitioner] to have complete reliance on FEA's position, [petitioner was required to] file a request for interpretation to the Office of General Counsel." The court of appeals correctly held that, in the face of such authoritative warnings, any reliance on the White letter was unreasonable and could not estop the Department from enforcing its regulations. See *Heckler* v. *Community Health Services of Crawford County, Inc.*, No. 83-56 (May 21, 1984), slip op. 12-13.

Petitioner seeks to circumvent the plain language of the letter by contending (Pet. 9-10) that the letter was orally authorized by the General Counsel. However, such authorization would be a departure from the procedure set out in the regulations [6] and would contradict the unequivocal language of the letter itself. Petitioner cites no authority holding that such unreasonable reliance may estop the government. See *Community Health Services*, slip op. 12-13 & n.21. Furthermore, petitioner's claim of oral authorization was refuted by the affidavit of the Assistant General Counsel alleged to have given the oral authorization (R. 6694)

> the regulations, rulings, and other precedents previously issued, to the particular facts of a prospective or completed act or transaction.

An interpretation may be relied upon by the requesting party alone (10 C.F.R. 205.85 (1978)).

A "ruling" is defined (10 C.F.R. 205.2) (see 10 C.F.R. 205.2 (1978)) as

> an official interpretative statement of general applicability issued by the DOE General Counsel and published in the FEDERAL REGISTER that applies the DOE regulations to a specific set of circumstances.

Any person may rely upon a ruling (10 C.F.R. 205.150 (1978)).

[6] See 10 C.F.R. 205.81-205.85 (1978) (specifying procedures for seeking and issuing an interpretation); 10 C.F.R. 205.150 (1978) (requiring publication of all rulings in Federal Register).

and was accordingly rejected by the district court (R. 5185, 5602). Petitioner's contention that it was entitled to a trial on this far-fetched and almost certainly futile factual claim is hardly an issue that merits consideration by this Court.

Moreover, petitioner did not properly preserve its claim that there was a factual issue that precluded summary judgment. Petitioner asserts (Pet. 6) that before moving for summary judgment it had informed the district court that the question of its alleged reliance on the White letter would be reserved for later trial. However, petitioner's motion (R. 2671) was silent on the subject of estoppel, and the only earlier reference to any such reservation was in an interrogatory answer served on the government, not on the district court, as petitioner implies. R. 1656. In any event, DOE filed a cross-motion for summary judgment that addressed "all legal issues pled in the complaint" (R. 4292) and filed a supporting brief contending that petitioner's alleged reliance on the White letter was of no relevance as a matter of law. R. 4371-4375. Petitioner did not submit an affidavit pursuant to Fed. R. Civ. P. 56(e) in order to establish a genuine issue of material fact for trial but responded instead with a reply brief addressing the legal issues. R. 4459. Accordingly, the court of appeals correctly held that the estoppel issue was properly before the district court on the government's cross-motion for summary judgment. Pet. App. 26a n.19; see *Adickes* v. *Kress & Co.*, 398 U.S. 144, 160-161 (1970).

b. Petitioner suggests (Pet. 12-14) that even if DOE was not estopped by the White letter, the letter was nevertheless entitled to considerable weight as a contemporaneous agency construction of the shrinkage regulations. This argument fails for reasons similar to those already discussed. The White letter was not an agency construction but an informal interpretation by an agency officer. See *Pennzoil Co.* v. *DOE*, 680 F.2d 156, 161 & n.8, 169-171 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983).

Both the regulations, of which petitioner was undoubtedly aware, and the letter itself expressly cautioned that the letter did not represent the formal position of the agency and should not be relied upon. In the face of these warnings, petitioner deliberately by-passed the procedure for obtaining a formal interpretation.

Under these circumstances, the court of appeals correctly concluded that the White letter was not entitled to interpretative weight. The court applied its earlier decision in *Pennzoil Co.* v. *DOE, supra,* which held that informal advice not constituting an institutional interpretation "is of little value." See also *Christmann & Welborn* v. *DOE,* No. 5-109 (Temp. Emer. Ct. App. Mar. 29, 1985), slip op. 5-6; Contrary to petitioner's assertion (Pet. 13-14), the *Pennzoil* case correctly applied this Court's decision in *Bowles* v. *Seminole Rock & Sand Co.,* 325 U.S. 410, 417-418 (1945), which involved institutional interpretations issued by the Administrator of the Office of Price Administration himself (see *id.* at 417-418). This Court found that the Administrator's official interpretations were of controlling weight since they had not been shown to be plainly erroneous or inconsistent with the regulation. *Ibid.* In the instant case, the court of appeals correctly applied *Bowles* in adopting the official institutional interpretation of the shrinkage regulations issued by the General Counsel of the FEA in Ruling 1975-18 (R. 3035) and in rejecting the contrary informal interpretation contained in the White letter.

2. Petitioner also alleges (Pet. 14-16) that the Subpart K rules are invalid because the court of appeals failed to follow *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 285 (1974), and *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983), in concluding that the Administrator of the FEA had properly considered the relevant factors in the

Subpart K rulemaking. This argument is both factually and legally unsound. Moreover, because the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627 *et seq.*, under which the regulations were promulgated, has now expired, this question is of no continuing importance.

According to petitioner (Pet. 15), the intrastate gas market and the contracts used in that market were "an important aspect of the problem of valuing gas lost through shrinkage," and since the FEA allegedly failed to consider that aspect, the court of appeals should have declared Subpart K to be arbitrary and capricious. However, the FEA expressly considered the intrastate gas market in issuing Subpart K. 39 Fed. Reg. 44409 (1974). Furthermore, since petitioner itself failed to mention its peculiar contracts or, for that matter, the intrastate market in its comments to the agency during the Subpart K rulemaking, its claim that the agency was required to consider them rings hollow. Thus, the court of appeals correctly rejected petitioner's argument (Pet. App. 28a-29a & n.20) and distinguished *Bowman* and *Motor Vehicle Mfrs. Ass'n.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

THOMAS C. NEWKIRK
Chief Counsel

LARRY P. ELLSWORTH
Deputy Chief Counsel

DON W. CROCKETT
JOHN L. GURNEY
Attorneys
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